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June 14, 1995

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William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply Comments of CBS Inc.
Review of the Syndication and Financial Interest Rules
MM Docket No. 95-39

Dear Mr. Caton,

Enclosed for filing in the above-captioned matter are the Reply Comments of CBS Inc. Pursuant to Section 1.419 of the Commission's Rules, this submission consists of the original document and five copies.

Please stamp the duplicate copy as received and return it for our records via the messenger.

Kindly contact the undersigned in the event that you have any questions or require additional information.

Respectfully submitted,

Rosemary C. Harold

Enclosures

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Syndication	)	MM Docket No. 95-39
and Financial Interest Rules,	)	
Sections 73.659 - 73.663	)	
of the Commission's Rules	)	
	)	

REPLY COMMENTS OF CBS INC.

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REPLY COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits these Reply Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In 1993, on the basis of a massive record, the Commission concluded that market conditions "did not justify continuation of the fin/syn regime,"[1] and decreed that the remaining rules would expire no later than November 10, 1995. The sole circumstance which the Commission identified as a basis for further delay in the repeal of these archaic and discriminatory rules was the possibility that their advocates could demonstrate in this sunset proceeding that "the

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[1] Review of the Syndication and Financial Interest Rules, MM Docket No. 95-39, FCC 95-144, at ¶ 10 (rel. Apr. 5, 1995) ("Notice") (citing Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 ("Second Report and Order"), recon. granted in part, 8 FCC Rcd 8270 (1993) ("Reconsideration Order"), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994)).

current status of the program production and distribution markets and the activities of the networks since 1993" somehow justified the rules' retention.[2] Both the Commission and the U.S. Court of Appeals for the Seventh Circuit have already conclusively found, however, that the specific program production, acquisition, and distribution markets affected by fin/syn regulation are competitive, and that unfettered network participation in those markets would enhance such competition.[3] Accordingly, as the Notice emphasizes, the proponents of continued fin/syn regulation bear a heavy burden of proof in this proceeding.[4]

Three parties have filed comments urging the retention of fin/syn rules.[5] None has even seriously attempted to meet the burden appropriately imposed by the Commission. Each has failed to address most of the fourteen factors specifically identified in the Notice as definitive to the determination whether fin/syn regulation should be retained. Even in the aggregate, these parties are silent with respect to many of the FCC's designated considerations. INTV and King World have merely recycled their old and previously discredited arguments, ignoring the Commission's clear indication that the burden of proof is on *them* to demonstrate a change of circumstances since 1993 so compelling as to justify alteration of the Commission's stated course. For its part, the Coalition -- while similarly ignoring most of the fourteen factors specified in the Notice, and making no remotely sufficient case for changed circumstances -- urges that the fin/syn

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[2] Notice at ¶ 12.

[3] Second Report and Order, 8 FCC Rcd at 3303-09, 3337-38; Capital Cities/ABC, 29 F.3d at 312-14 (citing Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992)).

[4] Notice at ¶¶ 1, 13.

[5] Comments of the Coalition To Preserve the Financial Interest and Syndication Rules, MM Docket No. 95-39 (filed May 30, 1995) ("Coalition Comments"); Comments of the Association of Independent Television Stations, Inc., MM Docket No. 95-39 (filed May 30, 1995) ("INTV Comments"); Comments of King World Productions, Inc., MM Docket No. 95-39 (filed May 30, 1995) ("King World Comments").

rules should be not merely retained but "strengthened," even beyond the bounds of the wholly discredited 1991 rules.

None of these submissions passes the red-face test, let alone the Commission's clearly articulated burden of proof. The record in this proceeding is devoid of evidence which could supply the "excellent" and "compelling" reasons the Court of Appeals has said the Commission must produce to justify any continuation of fin/syn rules.[6] As we urged in our initial comments, the FCC should therefore terminate them immediately.

II. NO CASE HAS BEEN MADE TO JUSTIFY CONTINUED RESTRICTIONS ON NETWORK PARTICIPATION IN SYNDICATION.

A. INTV Has Made No Effort To Satisfy Its Burden Of Proof.

The Commission's decision in 1993 to retain limitations on syndication by ABC, CBS, and NBC was intended in part to test its judgment that complete repeal of fin/syn regulation would not threaten its overall interest in maintaining outlet diversity.[7] Acknowledging that it was acting "out of an abundance of caution,"[8] the Commission chose to lift restrictions on network syndication gradually, and to give the beneficiaries of fin/syn regulation the opportunity in this proceeding to challenge the Commission's conclusions "regarding the state of the 1993 market -- that it can operate effectively without fin/syn restrictions -- and of developing market trends."[9] As noted above, INTV has made no effort to try to meet this challenge. It has totally failed to demonstrate that market developments, or network behavior in this partially deregulated

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[6] Capital Cities/ABC, 29 F.3d at 316.

[7] Reconsideration Order, 8 FCC Rcd at 8279.

[8] Notice at ¶ 10.

[9] Id. at ¶ 11.

environment, have exposed some threat to outlet diversity that the Commission did not consider and reject in 1993.

Rather, in apparent desperation, INTV now argues in substance that the *networks* have the burden of proof in this proceeding, suggesting that the planned sunset of the rules cannot proceed unless the Commission finds anew that "[e]ither independent stations no longer rely on syndicated programming, the networks lack the incentive or ability to deprive independent stations of access to the syndicated programming [they] rely on, or, even if the networks could deprive independent stations of the types of syndicated programming upon which [they] rely, a sufficient supply of truly substitutable programming is available in the marketplace."[10] This assertion is, of course, completely backwards. The Commission's core finding two years ago that market conditions did not justify retention of the fin/syn regime by its terms related to both the syndication *and* the financial interest restrictions.[11] It could not be clearer that INTV, not the networks, bears the burden of proof, and must therefore -- in its own words -- supply the Commission with "substantial evidence showing a material change of circumstances *vis-a-vis* its findings in 1993."[12]

The concerns about the effects of fin/syn repeal on independent stations were fully considered by the Commission before it adopted its decision to eliminate the rules. INTV has added nothing to this record. Except for a passing reference to CBS's unsurprising and unobjectionable intention to begin to engage in active syndication once when it is allowed to do so, INTV has merely recapitulated its old arguments and made no attempt to sustain its burden of

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[10] INTV Comments at 4-5.

[11] See Reconsideration Order, 8 FCC Rcd at 8278, 8291; Second Report and Order, 8 FCC Rcd at 3303-08, 3337-40; Notice at ¶ 9.

[12] INTV Comments at 3.

proof. Its comments do not furnish the remotest basis for the Commission to alter its declared course of action.

B. King World Has Produced No Evidence Which Would Justify Its Continued Protection From Free and Fair Competition.

In this proceeding, the burden on first-run syndicators who wish to preserve their insulation from competition through fin/syn regulation is to demonstrate that marketplace changes since 1993 justify the continued exclusion of ABC, CBS, and NBC from participation in a market the Commission has found they should be free to enter. Neither King World nor anyone else has made, or could make, this case. Whatever basis the Commission may once have thought it had for protecting independent first-run syndicators from full and fair competition has been swept away by developments in technology and in the video marketplace which have amply fulfilled the Commission's desire for increased diversity in the form of additional outlets for programming. As discussed in our initial comments, recent years have witnessed the development of three new broadcast television networks and of burgeoning alternative distributors, including cable, DBS, and VCRs.[13] Other new outlets wait in the wings.[14] These competing services provide a wealth of diverse programming choices to the viewer, and fertile ground for first-run syndicators. Wholly apart from the fact of these ever-expanding additional outlets, however, the rules' proponents have provided no proof that today's well-established first-run syndication industry requires continued special protection from the government.

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[13] Comments of CBS Inc., MM Docket No. 95-39, at 10-14 (filed May 30, 1995) ("CBS Comments").

[14] Id. at 13-14; Comments of Capital Cities/ABC, Inc., MM Docket No. 95-39, at 7 (filed May 30, 1995); Comments of National Broadcasting Company, Inc., MM Docket No. 95-39, at 5 (filed May 30, 1995).

In its comments, King World reiterates the argument -- which the Commission and the Court of Appeals have already rejected -- that networks would have an anticompetitive advantage in the first-run syndication business because of "vertical integration."[15] This thesis, if credited, would of course now compel the application of first-run syndication restrictions to Tribune, Chris Craft, and Paramount. Since 1993, each of these deep-pocketed companies has joined a flourishing Fox Broadcasting as major market station owners who have been "integrated" into new broadcast networks, free of the burden of complying with outdated fin/syn regulations. In any event, King World's unsubstantiated hypothesis falls far short of providing the "excellent" and "compelling" reason the Commission would have to supply in order to justify further regulation.

The little evidence that is provided regarding network involvement to date with passive syndication interests reveals only that the behavior of ABC, CBS, and NBC poses no special competitive threat. NBC's experience with the failed "Memories Then and Now," for example, suggests that networks lack both the clout to force affiliates to purchase their own first-run fare, and the ability or incentive to keep such programming on the air if it fails to attract an audience.[16] King World's sole reference to CBS as a potential first-run syndicator relates to a program, "Day and Date," that will be produced by a joint venture between Westinghouse Broadcasting and CBS, and made available to CBS- and Group W-owned stations for broadcast in the "early fringe" time period. King World cannot be suggesting that it is entitled to Commission protection against the production by station group owners, individually or jointly, of first-run programming

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[15] King World Comments at 4-5.

[16] Id. at 9 (claiming that thirty-one of the forty-four stations initially carrying the now-cancelled program were owned or affiliated with the network). Even assuming that King World's figures are accurate, the fact that fewer than 17 percent of NBC's affiliates aired the program demonstrates a decided inability to "exploit ... control over the distribution system." Id.

for their own stations. CBS does indeed expect that the program will be syndicated by the joint venture to non-CBS stations when the remaining fin/syn rules are repealed. Notwithstanding King World's intimations to the contrary, however, Group W and CBS will not discriminate against non-CBS affiliates in the distribution of the program.

Like INTV, King World has not even tried to meet its burden of showing that changed circumstances justify serious consideration of continued regulation to protect its competitive advantage. Because of marketplace developments since 1993, King World's failed arguments have grown even less persuasive than they were when they were first propounded. They are irrelevant to this proceeding.

III. THE COALITION HAS PRODUCED NO SUPPORT FOR ITS EFFORT TO RESURRECT THE FINANCIAL INTEREST RULE.

The Coalition somewhat perfunctorily includes the retention of the remaining syndication restrictions among its goals in this proceeding. Its comments are almost entirely concerned, however, with reinstating the *financial interest* rule -- in a form even more onerous than the discredited 1991 version,[17] and with added regulatory limitations on the option terms that can be negotiated between a network and its program suppliers.[18] The Coalition fails to demonstrate a degree of "network abuses in the programming acquisition market" that could

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[17] See Coalition Comments at 2-6, 20-22. According to the Coalition, an appropriately "strengthened" financial interest rule would include a version of a "separate negotiation" requirement for fin/syn rights that was rejected even in 1991 as too onerous. Id.; see also Evaluation of this Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3115 & nn.62, 63 ("1991 Report and Order"), recon. granted in part, 7 FCC Rcd 345, 359 (1991) ("1991 Reconsideration Order").

[18] The Coalition's option period suggestion has long been on the studios' "wish list" because of the bargaining advantage they enjoy under the soon-to-expire consent decree provision. See infra note 32.

remotely justify its plea to resurrect a privileged markeplace.[19] Indeed, like INTV and King World, it does not come close to meeting the burden of proof it must satisfy to justify continuation of the current rules.

As noted above, the Coalition has ignored most of the fourteen marketplace and behavioral factors that the Commission specified as relevant to this final review of the remaining fin/syn rules. Instead of providing "empirical data and economic analysis,"[20] it has proffered a few unattributed statistics that, even if true, give no support to its position. For "economic analysis," it has simply attached excerpts from earlier submissions that have previously been found unpersuasive by the Commission and the Court of Appeals.[21] To the extent that the Coalition's comments comprise reargument of its already discredited economic and marketplace theories in support of fin/syn regulation, they are beyond the scope of the Notice and should be dismissed out of hand. To the extent they make assertions about network behavior and marketplace changes since 1993, they are unconvincing. We respond briefly to some of these assertions below.

1. Inventing its own version of the burden of proof in this proceeding, the Coalition attempts to show that the *benefits* of fin/syn repeal have not been demonstrated during the transition period to full deregulation. That is plainly not the question here, but it is clear in any case that new opportunities for flexible network financing of program suppliers have indeed begun to have a positive effect in the marketplace. The Coalition itself recites a list of new

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[19] Reconsideration Order, 8 FCC Rcd at 8293.

[20] Notice at ¶ 12.

[21] See Second Report and Order, 8 FCC Rcd. at 3303-09; Reconsideration Order, 8 FCC Rcd at 8285-90; Capital Cities/ABC, 29 F.2d at 312-14 (rejecting economic analysis espoused by Coalition consultant Frederick R. Warren-Boulton, originally submitted two years ago in MM Docket 90-162 and appended as Exhibit 1 to the Coalition Comments in this docket).

network/producer relationships that have been formed in connection with the 1995-96 prime time network schedules with producers whom it characterizes as "successful," "highly acclaimed," or otherwise "experienced," including James Burrows, Steven Bochco, Miller-Boyett, and others. Astonishingly, it concludes that this activity demonstrates that the prospects for securing financing for its "smallest, least established" members "have *worsened* as a result of the repeal of the financial interest rule."[22] This activity is in fact potent evidence of the success of an unregulated marketplace in providing new opportunities for program producers, large and small.

An intended effect of financial interest rule deregulation was to allow the original networks to compete on a more equal footing with the major studios as producers and financiers of prime time programming and, by doing so, to provide increased opportunity for creative arrangements between these new network competitors and the independent production community. That effect is occurring. Steven Bochco, for example, is the "highly acclaimed" independent producer whose arrangement with CBS is noted by the Coalition with suspicion. It is hard to see why the fact that Mr. Bochco is now free to enter into a creative financial relationship with CBS rather than Time-Warner, Sony, or Fox, for example, is proof that deregulation is not working. If it proves anything, it is that deregulation *is* working, and there is every reason to expect that this new competition will create new opportunities for the next generation of would-be Steven Bochcos among the Coalition's "smallest, least established" members.

2. The Coalition next asserts that "since 1993 the networks have uniformly *lowered*

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[22] Coalition Comments at 10 (emphasis in original).

the license fees they pay for prime time entertainment programming."[23] It maintains that this development, in combination with an increase in in-house productions of "lower cost magazine and 'reality' shows," has resulted in "a reduction in overall investment in prime time entertainment programming."[24] Even if its factual premises could be demonstrated, this argument proves nothing.[25]

Needless to say, it cannot be a concern of the Commission to protect the profit levels of program producers, creative talent, networks, syndicators, or anyone else in the program supply marketplace. Network license fees in the aggregate fluctuate for a variety of reasons, and license fees for individual shows are only one aspect of increasingly complex negotiations between producers and networks. Because of competitive pressures and the state of the economy in general, networks may from time to time be especially interested in containing their costs and the costs of their program suppliers, a concern that may well result in a somewhat lower negotiated licensed fee in individual situations. And, of course, year-to-year variations in the supply and demand for new programs will affect license fees. Even assuming the Coalition's assertion to be true, therefore, it raises no implication -- much less the proof required by the Notice -- of any

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[23] Id. at 11 (emphasis in original).

[24] Id. at 11-12.

[25] The Coalition cites no source for its assertions. We note with interest, therefore, a recent trade press report that "the Big Three and Fox Broadcasting Co. have dug deep in their pockets this development season to fund what they hope is a new generation of hits." J. Max Robins, Nets Spend Big on New Shows, Daily Variety, May 23, 1995, at 1. The same report notes that CBS "spent upwards of $45 million on pilots, . . . 10% to 15% more than the nets usually pay for pilots." Id. at 32. In addition, independent industry analysts have reported that the average license fees paid by ABC, CBS, and NBC, as estimated on a per-hour basis, held steady from the 1992-93 season through the 1994-95 season. Paul Kagan Associates, Inc., TV Program Stats, Sept. 30, 1994, at 1 (showing that throughout period, the three-network combined average registered a $3,000 increase by 1994-95).

problematic network behavior since 1993 that remotely justifies continued fin/syn regulation.

3. The Coalition also asserts that "the trend toward increasing levels of program concentration in the hands of the networks has continued unabated," and that "[t]he Commission can reverse this trend, and thus enhance diversity . . . only by strengthening the FISR."[26] To support this assertion, the Coalition notes that "[i]n the two years since the repeal of the financial interest rule, the networks' share of copyrights held in prime time entertainment programs increased from 29 percent to 35 percent."[27] While we question the accuracy of these figures,[28] we respectfully suggest that a 6 percent increase in network-owned prime time entertainment programming over a two-year period is hardly evidence of a trend toward concentration, much less a threat to diversity -- if for no other reason than the fact that two of the primary suppliers of network programming (Time-Warner and Viacom/Paramount) have established their own networks which will provide guaranteed distribution for their own programming. These new

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[26] Coalition Comments at 14.

[27] Id. at 13.

[28] Data submitted in the Prime Time Access Rule proceeding shows that only 19.03 percent of the networks' prime time entertainment series hours broadcast in the 1993-94 season was attributable to network in-house productions or co-productions, as was 25.82 percent in 1994-95 and 22.22 percent in the current fall 1995 schedules. Economists Incorporated, An Economic Analysis of the Prime Time Access Rule, MM Docket No. 94-123 (filed March 7, 1995, as updated on June 12, 1995) ("EI Analysis").

The Coalition also asserts that the networks took "ownership interests [by means of co-productions or in-house productions] in approximately 40 percent of the programs added to [their] prime time line-ups in the last two years." Coalition Comments at 14, 17. It is not clear which two-year period the Coalition is referring to, but whatever the intended time frame, the asserted percentage of new co-productions or in-house productions appears to us to be too high. In any case, it is worth reemphasizing that "of the seven [new] network-owned productions on the [1994-95] fall schedule, . . . none is still on the air." CBS Comments at 15 (citing New York Times, April 17, 1995, at D-8).

entities presumably will also provide new program production opportunities for the Coalition's other producer/members. In any case, the Coalition's "unabated trend" has apparently abated for the fall 1995 season.[29]

4. The Coalition admits that it has no evidence of anticompetitive network activity during the post-June 1993 period at issue in this proceeding. The best it can do is resurrect bare assertions about network "market power" and conjure spectres of possible abusive exercise of that power beginning on November 10. This familiar rhetoric is facially insufficient in light of the previous findings by the Commission and the Court of Appeals that market conditions in 1993 did not justify continuation of the fin/syn regime.[30]

Despite its admission that the networks have engaged in no anticompetive behavior, the Coalition gamely tries to find some. It restates the benign and unremarkable license fee and program production/acquisition statistics discussed earlier, and ominously juxtaposes them with a quote from a "veteran network executive" that "[t]his is all a game of leverage, and when you have it you use it."[31] Apart from the fact that "leverage" is an everyday marketplace phenomenon that hardly equates with market power, we cannot refrain from noting that the quote chosen was

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[29] Consistent with the data in the EI Analysis, supra note 28, the trade press recently reported that the three original networks have "receded in their producing presence" and will have an ownership interest in only 22 percent of their regularly scheduled series (and about 30 percent of their overall prime time schedules, including news and sports). See Brian Lowry, WB Packs Primetime Wallop, Variety, May 25, 1995, at 1, 19. While the Coalition cites this article, Coalition Comments at 18, it conveniently ignores this statistic in describing its "unabated trend," claiming that "[d]ata concerning copyright ownership of prime time entertainment programs for the Fall 1995/96 season is not yet available to the Coalition." Id. at 13, n.29.

[30] Notice at ¶ 9; see also supra note 11.

[31] Coalition Comments at 18 (citing J. Max Robins, Nets, Producers Face Off as Fee Fight Foes, Variety, May 8-14, 1995, at 29).

made in specific reference to *studios*, not networks.[32] In a curious twist of logic, the Coalition then asserts that the emergence of the two new competitive broadcast networks, run by two of its studio members in conjunction with major group station owners, somehow bolsters its position that the three original networks have increased market power.[33] In fact, as we pointed out in our initial comments, these entities obviously provide additional competition to the original networks in the programming acquisition marketplace, and represent yet another marketplace development underscoring the need for repeal of the fin/syn rules.[34]

5. Finally, the Coalition complains that there has been continuing consolidation within the production industry. Both the FCC and the courts have recognized that this phenomenon has occurred throughout the 25-year period of the fin/syn regime,[35] which demonstrates the historic failure of the rules to promote a wider diversity of program sources. That this trend was not immediately reversed following partial repeal of the rules in 1993 can surprise no one, and surely affords no basis for a conclusion that the remaining fin/syn rules should remain in place. In any case, the consolidation in production reflects the increasing role of the major studios in prime time

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[32] "And what about [when] the initial four-year licensing agreement is over on a hit and then the studio shows it appreciation by socking it to you on the renewal. This is all a game of leverage, and when you have it you use it." Id.

[33] The Coalition suggests that in the Commission's pending Prime Time Access Rule proceeding the networks have confessed to having market power by adopting a conclusion of their consulting economist that the implementation of PTAR resulted in a drop-off in viewing during the access hour. We confess only to not understanding the Coalition's argument, and we refer the Commission to that study, which includes a comprehensive debunking of "network dominance" arguments in general. See EI Analysis, supra note 28, at 5-27.

[34] CBS Comments at 12.

[35] Second Report and Order, 8 FCC Rcd at 3310-11; Capital Citites/ABC, 29 F.3d at 312.

program supply, not any activity attributable to the networks.[36]

IV. THERE IS NO NEED TO RETAIN NETWORK REPORTING REQUIREMENTS.

Both INTV and the Coalition urge that the Commission should retain reporting requirements for the networks so that their "marketplace practices can be monitored more effectively,"[37] and the Commission can "remain knowledgeable and poised to take remedial action if entrenched network conduct threatens new competition and diversity in broadcast television."[38] In another pending proceeding, the Commission has proposed to reduce burdensome costs to both itself and network affiliates by eliminating the requirement that those affiliates file their network agreements with the Commission.[39] The marketplace changes that motivated that deregulatory initiative are at least as applicable here. There is no conceivable reason to continue to impose needless and onerous paperwork requirements on selected participants in the industry.

CONCLUSION

This is not even a close case. None of the proponents of continued fin/syn regulation has even purported to meet the standard of proof that the Commission clearly and appropriately assigned to them in the Notice. To the extent that they have made *any* new assertions based on

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[36] "[T]he major studios . . . jointly are responsible or have an interest in roughly 70% of the . . . series slated to premier in September, and two-thirds of all hours of series programming . . . , an increase of roughly 10% over last year." Lowry, supra note 29, at 1.

[37] Coalition Comments at 22.

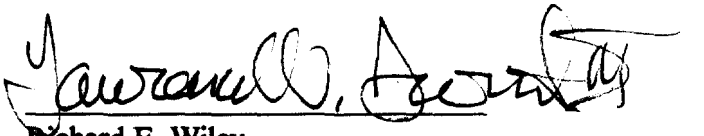
[38] INTV Comments at 13-14.

[39] Amendment of Part 73 of the Commission's Rules concerning the Filing of Television Network Affiliation Contracts, MM Docket No. 95-40, FCC 95-145 (rel. Apr. 5, 1995).

post-June 1993 developments, they have demonstrated nothing that is inconsistent with the conclusion that market conditions -- then and now -- do not justify perpetuation of any fin/syn regulation. The remaining rules should be repealed immediately.

Respectfully submitted,

CBS Inc.

By: 

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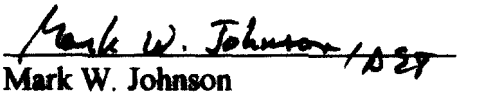
By: 

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June 14, 1995

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CERTIFICATE OF SERVICE

I, Rosemary C. Harold, do hereby certify that on this 14th day of June, 1995, I caused copies of the foregoing "REPLY COMMENTS OF CBS INC." to be mailed via first-class postage prepaid, unless otherwise indicated below, to the following:

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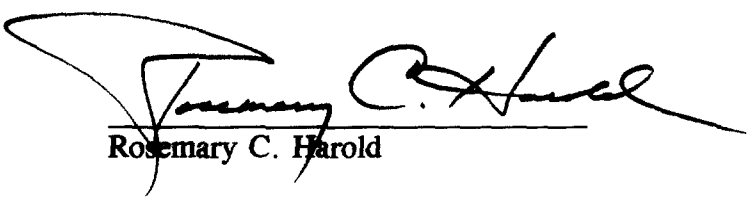

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